he has not made up his mind, after having ordered confiscation of the goods, whether they are over-issued magazines or newspapers. He said:—

"I acquitted the defendants because there are not enough evidence to indicate either. I was in grave doubt as to whether these are over-issued newspapers or magazines and as such whether they are dutiable or not."

It is obvious therefore that the learned president had failed to come to a finding of fact one way or the other and was avoiding the issue but sought to compromise by acquitting the appellants, yet would not let them off completely by confiscating the goods.

There is no question here of any *delegatus non potest delegare* principle being applied as P.6 is a decision purported to have been made by the Comptroller-General of Customs. The defence called the person who signed P.6 and this witness said:—

"The Comptroller-General classified them as newspapers. The decision was not mine."

Therefore, no question of invoking section 3(3) and section 22 of the Act and contending that P.6 must be executed personally by the Comptroller-General arises.

In the circumstances I am acting under section 322 and by way of revision, I set aside the order of acquittal of the appellants on the two charges and I order that the appellants be retried on the two charges before another president. The order of confiscation is also to be set aside and will be dealt with at the new trial.

Orders of acquittal and confiscation set aside. Re-trial ordered.

Solicitors: *Eugene Khoo & Co.*

PUBLIC PROSECUTOR v. MUSA

[A.Cr.J. (Syed Othman J.) July 31, 1969]

[Kota Bharu — Criminal Appeal No. 12 of 1968]

Internal Security — Detention — Order made against person — Subsequent restriction order — Whether Minister was functus officio in making the detention order and was precluded from making the restriction order — Internal Security Act, 1960, s. 8(1) (a) & (b).

Constitutional Law — Administrative function — Detention or restriction orders — Not punishment for purposes of art. 7, Malaysia Constitution.

This was an appeal against the acquittal of the respondent on a charge of contravention of a restriction order. The respondent had been detained under section 8(1)(a) of the Internal Security Act since 1963. In 1968 he was served with a restriction order and it was for breach of this order that he was charged. It was argued on behalf of the respondent that once an order had been made under section 8(1)(a) of the Act, the Minister was *functus officio* and was therefore precluded from making an order under section 8(1)(b). This argument was accepted by the learned president of the sessions court.

Held, allowing the appeal: (1) the act of the Minister in issuing a detention or restriction order under section 8(1)(b) of the Act is in the exercise of his administrative function and the orders cannot be equated to orders of conviction for an offence or crime;

(2) the Minister was not precluded from making the restriction order in this case and as there was no evidence of bad faith, the restriction order was valid and should be enforced.

Cases referred to:—

(1) *In re Clew* (1881), 8 Q.B.D. 511.

(2) *Lim Hock Siew & Ors. v. The Minister of Interior & Defence* [1968] 2 M.L.J. 219.

MAGISTRATE'S CRIMINAL APPEAL

Abu Talib bin Osman (Deputy Public Prosecutor) for the appellant.

Raja Abdul Aziz bin Raja Addruse (*Mohamed Dzaiddin bin Haji Abdullah* with him) for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The respondent was charged to the effect that he, being a person subject to the order of the Menteri Hal Ehwal Dalam Negeri,* Malaysia, under section 8(1)(b) of the Internal Security Act, 1960, contravened the said order by leaving the area of Pasir Puteh District without the prior permission in writing of the officer-in-charge, Police District, Pasir Puteh, thereby committing an offence punishable under section 44 of the Internal Security Act, 1960.

At the conclusion of the trial, the learned president acquitted the respondent. The Public Prosecutor has appealed against the acquittal.

The prosecution case was as follows: The respondent, a teacher, was under detention at Batu Gajah Detention Camp where on 9th January, 1968, he was served with an order made by the Menteri Hal Ehwal Dalam Negeri under section 8(1)(b) of the Internal Security Act, 1960. One of the conditions of the order was that he:—

"Shall reside and remain within the area of Pasir Puteh Police District and shall not leave or move out of Pasir Puteh Police District without the prior permission in writing of the officer-in-charge of Pasir Puteh Police District."

The order was accompanied by a bond.

The respondent refused to acknowledge the order and the bond. He said to the police inspector who was serving the documents on him that he was not accepting the conditions and that if the Government released him under those conditions he would rather stay in the

* Minister of Home Affairs.

camp. Apparently foreseeing the refusal the police inspector delivered to him the order, the bond and a memorandum which stated that the conditions of the restriction order under section 8(1)(b) were binding upon him whether or not he accepted them, or even if he refused to sign the bond, the conditions were still binding upon him.

There is nothing to show when the respondent was actually released from the detention camp. On 3rd February, 1968 at 3 p.m. a detective saw the respondent in Kota Bharu near the market and arrested him.

The case for the defence was that the respondent had been detained under section 8(1)(a) of the Internal Security Act, 1960 since 1963. In 1968 when the inspector was serving on him the restriction order under section 8(1)(b) of the Act he refused to accept it and also to sign the bond. He admitted having received the inspector's memorandum.

On the evidence as adduced, it is clear that the restriction order only applied to the respondent.

At the close of the case for the defence, learned counsel for the respondent submitted arguments questioning in effect the validity of the order. It was submitted that once a Minister had exercised his powers against a person under section 8(1)(a) of the Internal Security Act, 1960 by issuing a detention order he was *functus officio* and was precluded from exercising his powers under section 8(1)(b) by issuing a restriction order. It was further argued that the principle of *autrefois convict* should apply to the case. Article 7 of the Constitution was cited in support of the arguments. This article provides:—

"7(1). No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(2). A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."

From the record of proceedings the learned president appears to have accepted the arguments wholly.

The appeal against the acquittal is on various grounds mainly on points of law raised in the grounds of judgment of the learned president.

Section 8(1) of the Act reads as follows:—

"8(1). If the Yang di-Pertuan Agong is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Malaya or any part thereof, it is necessary so to do, the Minister shall make an order:-

(a) directing that such person be detained for any period not exceeding two years, or,

(b) for all or any of the following purposes, that is to say:—

(i) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;

(ii) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;

(iii) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;

(iv) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to any organisation or association, or from taking part in any political activities;

(v) for prohibiting him from travelling beyond the limits of the Federation or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order;

and any order made under paragraph (b) of this subsection shall be for such period, not exceeding two years, as may be specified therein, and may by such order be required to be supported by a bond."

The words "Yang di-Pertuan Agong" in subsection (1) have now been substituted by the word "Minister". See P.U.(A) 186 of 1969.

In arguing that once an order had been made under paragraph (a) of sub-section (1) of the section, (which I shall refer to as the detention order) the Minister was *functus officio* and was therefore precluded from making an order under paragraph (b) of the sub-section, (which I shall refer to as the restriction order), learned counsel for the respondent mainly relied on the case of *In re Clew*.[1] At page 514 Lopez J. said:—

"I think that the conviction ought to be quashed. It was under section 3 of the Licensing Act, 1872, empowering the justices either to fine or imprison. The punishment is alternative. They have no power under that section to imprison in default of payment of a fine. But purporting to act under that section, they ordered that the defendant should pay a fine, and costs, and in default of payment should be imprisoned. I think the justices have exceeded their power, and the conviction is bad."

The learned president in dealing with the argument of learned counsel dwelt at length on crime and punishment and after mentioning some authorities relating to the definition of crime, said:—

"The word 'punishment' according to its ordinary meaning, is the causing of an offender to suffer for an offence. It is with this in view that I held that the accused had been punished twice for the same offence

of which he had already been punished prior to the restriction order being made against him on 9th January, 1968. And, there could never be a subsequent or fresh offence committed by the accused, since his detention, because he had continuously been under detention until the date of the fresh order on 9th January, 1968."

The fresh order of 9th January, 1968 referred to is the restriction order.

It is clear that Lopez J. in his judgment was referring to the conviction of a case under section 3 of the Licensing Act, 1872 after a trial before the court. Hence the necessary ingredient which leads to a conviction for an offence or a crime and to punishment as contemplated by the case cited and by article 7 is that there must be a trial before a court of law. The authorities cited cannot be stretched to a situation where there is no trial before a court of law.

Wee Chong Jin C.J. (of Singapore) in *Lim Hock Siew and Ors. v. The Minister of Interior and Defence*[2] said that the orders under section 8(1)(a) of Internal Security Act, 1960, i.e. detention orders were the result of an exercise of administrative function. I respectfully agree with this statement of the law. There can be no doubt that this statement is equally applicable to a restriction order.

In my judgment, therefore, the satisfaction of the Minister with respect to any person under section 8 of the Internal Security Act, 1960, is not a conviction for an offence or crime and the detention or restriction order is not a punishment for the purpose of article 7 of the Constitution. The detention or restriction as clearly indicated in section 8 of the Act is an act by the executive to prevent a person from doing harm to the State. The learned president was clearly wrong in having treated a person under preventive detention as an offender.

As to the argument that the principle of *autrefois convict* should be made to apply to the case i.e. once a person has been detained, there cannot be issued against him a restriction order on the same set of facts, there is an assumption in this argument that the restriction order following the successive detention orders was on the same set of facts or allegations against the respondent. There is no evidence to suggest that this was so. Even if there was such evidence I do not think that the Minister's decision can be disturbed on that ground.

The dividing line between this argument and the argument that the Minister was *functus officio* is rather thin. I would say that the two arguments are an expression of the same thing but in different words. The implications of both arguments are that not only the Minister would be precluded from making a restriction order after he has made a detention order but also he could not extend the period of the detention order. They would also have the effect of challenging the validity of sub-section (1A) of section 8 of the Act. This sub-section reads:—

> "The Minister may direct that the period of any order made under sub-section (1) be extended for a further period or periods not exceeding two years at a time."

But learned counsel has submitted that he was not questioning the power to extend the period of detention under sub-section (1A) of section 8. I must confess that I fail to grasp that the arguments do not have this implication. As I see it, together they can only have this implication since their essence is that the original action of the Minister should operate as a bar to all further actions.

The Internal Security Act, 1960 was made under article 149 of the Constitution. The first two recitals of the Act read:—

> "*Whereas* action has been taken by a substantial body of persons to cause a substantial number of citizens to fear organised violence against persons or property.
>
> *And Whereas* action has been taken and threatened by a substantial body of persons which is prejudicial to the security of Malaya."

It is not in dispute the conditions as recited in the Act exist in the country. By that article any provision of that law designed to stop or prevent that action is valid, notwithstanding that it is inconsistent with any of the provisions of articles 5, 9 or 10 or would apart from that article be outside the legislative power of Parliament.

Article 5 generally relates to the liberty of the person. Article 9 relates to the prohibition of banishment and freedom of movement of citizens; article 10 relates to freedom of speech, assembly and association.

Article 149 clearly gives a very wide power of legislation, particularly when it says that any provision of the law designed to stop or prevent the action which has been taken or threatened is valid notwithstanding that it would apart from this article be outside the legislative power of Parliament and particularly when it says that notwithstanding that it is inconsistent with article 5.

Having regard to the foregoing provisions, I am of the opinion that the provisions of sub-section (1A) of section 8 of the Internal Security Act, 1960 are within the competence of the legislature. As far as I can say they are designed with an eye to administrative convenience to do away with the need of the Minister making a fresh detention order if he considers at the

end of detention period, the person should be detained further. At the same time, I can see nothing which fetters the power of the Minister to detain a person, simply because before detaining him he has placed him under restriction or *vice versa*. If he has restricted a person, he may on the expiry of the restriction order detain him, and it follows that if he has detained a person, he may on the expiry of the detention order, restrict him, provided that before making either order, as the case may require, he is so satisfied in accordance with the provisions of sub-section (1) of section 8 of the Act.

It seems to me that the arguments of learned counsel for the respondent amount to nothing more than a cover for challenging the satisfaction of the Yang di-Pertuan Agong when he made the order. The Yang di-Pertuan Agong when making the restriction order clearly expressed that he was satisfied that the respondent should be restricted. The order should be treated as a fresh one. It should not be regarded as related to the detention order because when he made this order he had been satisfied that the respondent should have been detained. The restriction order might have been made on changing circumstances or situation relating to the respondent on the expiry of the detention order. Nevertheless in making the restriction order the Yang di-Pertuan Agong was satisfied afresh. The only ground, as far as I am aware, on which the court can say that it is invalid is that it was made in bad faith. This was not shown in this case.

I would agree that once a detention order has been made a restriction order cannot be made at the same time against the same person because section 8 of the Act says the order to be made is either detention or restriction. It is alternative in this sense. It is in this situation only that I would say that the Minister would be *functus officio*. From what I can see it would be pointless to make one order at the same time as the other. But there is nothing to prevent one order being made on the expiry of the other upon a fresh satisfaction.

The appeal is allowed. The order of acquittal is set aside. I order that the respondent be retried.

Appeal allowed. Order of acquittal set aside. Re-trial ordered.

Solicitors: *Rithauddeen & Aziz.*

SAW CHING HO & ANOR. v. TAN AH KUI

[O.C.J. (Sharma J.) August 14, 1969]

[Malacca — Civil Suit No. 154 of 1966]

Practice and Procedure — Costs — Settlement of claim by plaintiff — Costs required to be taxed — R.S.C. 1957, O. 22 r. 14(11).

In this case an application was made by the next friend of an infant plaintiff for approval of the settlement of a claim for $10,000 and *inter alia* for an order that "the costs chargeable on a solicitor and client basis but not chargeable as between party and party be fixed at the sum of $1,000 and be paid to the plaintiff's solicitors out of the sum of $10,000."

Held: in view of the mandatory provisions by O. 22 r. 14(11), which require the costs in such a case to be taxed and certified the prayer relating to costs should be refused.

Case referred to:—

(1) *Barker and Anor. v. S. Green & Sons Ltd.* [1933] W.N. 190.

CIVIL SUIT

A.C. Vohrah for the plaintiffs.

S.G. Thakurta for the defendant.

Cur. Adv. Vult.

Sharma J.: The first plaintiff is an infant who sues by his next friend Saw Swee Teck. (O. 16 r. 16). Saw Swee Teck is also the second plaintiff in the suit. An application has been made under Order 22 rule 14(1), (2), (3) and (4) of our Rules of the Supreme Court seeking approval of the court for settlement of both the plaintiffs' claim at $10,000 and for certain other orders mentioned in the summons-in-chambers (enclosure 52). The defendant's counsel has consented to all the orders sought except prayer No. 2 which reads as follows:—

"That the costs chargeable on a solicitor and client basis but not chargeable as between party and party be fixed at the sum of $1,000.00 and be paid to the plaintiff's solicitors out of the sum of $10,000.00;"

It is the contention of counsel for the defendant that as far as that prayer is concerned the matter is entirely between the plaintiffs and their solicitors. I agree with that contention and have consequently made no order on prayer No. 2.

Mr. Vohrah urged before me that our rules contained no provisions with regard to prayer No. 2 of the application and consequently under Order 72 rule 2 the practice and procedure in England was applicable. It is not necessary for me to say whether the practice and procedure which was in force in Malaya immediately before the Rules of the Supreme Court came into force should be preferred to the practice and procedure in force in the Courts of England at that time because there exists an express provision in Order 22 rule 14(11) covering the point. If an action comes up for